

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re)
)
Amendment of)
Section 73.202(b) of the)
Commission's Rules,)
Table of Allotments,)
FM Broadcast Stations)
(Llano and Marble Falls, Texas))

MM Docket No. 95-49

RM-8858

RM-8558
RECEIVED

JUL 7 1995

FEDERAL COMMUNICATIONS COMMISSION
CLERK OF COURT ONLY

To: The Acting Chief, Allocations Branch,
Mass Media Bureau

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS

Maxagrid Broadcasting Corporation ("Maxagrid"), the licensee of radio station KBAE(FM), Channel 284C3, Llano, Texas, hereby tenders its Reply Comments in this rule making. These Reply Comments will address the Comments of the Kirkman Group, Inc. However, for reasons stated below, Maxagrid will forebear discussion of the "Comments and Counterproposal" filed by Roy E. Henderson.

I. Background

1. Maxagrid's Petition for Rule Making initiated this proceeding. Maxagrid requested that the Commission relicense station KBAE (formerly KLKM) to the presently unserved community of Marble Falls, Texas on Channel 285C3.¹ So that Llano would

¹ Station KBAE presently serves Llano, Texas on Channel 284C3.

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continue to receive local service, Maxagrid's identified Channel 242A as capable of supporting a transmission service at Llano in full compliance with the Commission's FM technical licensing rules, and Maxagrid suggested that the Agency allot that channel to KBAE's present community of license.

2. In response to Maxagrid's Petition, the Commission issued a Notice of Proposed Rule Making and Order to Show Cause, DA 95-884 (adopted April 19, 1995 and released May 1, 1995), proposing to make the requested channel substitution and license modification. The NPRM set June 22 as the deadline for Comments and July 7 as the deadline for Reply Comments. By the June 22 Comment deadline, as required by Commission practice, Maxagrid filed its statement of continuing interest in relicensing KBAE. Maxagrid's Comments also addressed certain issues raised by the NPRM. Among other things, Maxagrid stated its clear intent to apply for Channel 242A at Llano. Maxagrid also showed that Marble Falls, as the larger and more dynamic community, deserved the reallocation of the Class C3 facility. Maxagrid also showed that the requested reallocation would serve the interests of spectral efficiency and the overall public interest.

3. Maxagrid has received service a service copy of the "Comments and Counterproposal" of Roy E. Henderson. Mr. Henderson holds an interest in station KLTO, Channel 285A, Rosenberg, Texas. Mr. Henderson requests the allotment of Channel 285A to Katy, Texas and the relicensing of KLTO to that community. For Channel 285A to meet spacing as well as city-grade requirements to Katy, Mr. Henderson suggests a physical relocation of cochannel station KBUK, LaGrange, Texas, to Smithville, Texas. Mr.

Henderson says that he "would agree to reimburse [KBUK's] licensee for all reasonable expenses incurred from the relocation to Smithville, Texas...."

4. Maxagrid has also received a service copy of Comments by the Kirkman Group, Inc. ("KGI"). KGI describes itself as "the licensee of stations KHLB-AM and FM, Marble Falls, Texas." KGI "opposes the proposed reallocation because it would deprive Llano of its only licensed radio station and would add an unnecessary signal to Marble Falls."

II. Argument

A. Reply Comments to the Counterproposal Are Not Ripe

5. Mr. Henderson has characterized his request for reallocation of Channel 285A from Rosenberg, Texas to Katy, Texas, and from LaGrange, Texas to Smithville, Texas as a "Counterproposal" to the NPRM. However, it is the Commission's sole province to determine whether the pleading is both technically mutually exclusive with Maxagrid's Petition for Rule Making and sufficient for consideration as a Counterproposal in this proceeding. If the FCC finds Mr. Henderson's proposal eligible for consideration as a Counterproposal in this proceeding, consistent with established procedure, the Commission will issue a Public Notice specifically to establish a deadline for Reply Comments directed thereto. Thus, even though Maxagrid has significant reservations about the merits of Mr. Henderson's proposal, Maxagrid reserves the right to withhold the reservations until the

deadline for Reply Comments directed specifically to Mr. Henderson's filing to be established, if at all, by a pertinent public notice.

B. KGI's Comments Lack Merit

6. At one point, KGI's Comments assert that KGI's stations KHLB(AM) and KHLB-FM already provide transmission service to Marble Falls. But in other places, KGI takes a different tack. The Statement of William E. Kirkman, appended to those Comments, asserts that:

a. "Marble Falls, Texas, which is in Burnet County, has three (3) radio stations presently licensed."

b. "[KGI's] radio stations, KHLB (AM) and KHLB (FM), are more than adequately covering and serving all of Burnet County, including the City of Marble Falls, even though our city of license of Burnet, Texas (county seat). We offer local news and public information for the entire area. * * * KHLB is the official radio station for the City of Marble Falls Emergency Management Administration. KHLB (FM) is also the primary emergency network radio station for the Lower Colorado River Authority."

c. "I believe no additional population will be reached by reallotting [KBAE] to Marble Falls. However, the City of Llano will lose its only first local transmission [service], and listeners will be lost in the Llano County area."

7. KGI is simply wrong on the facts. *No station, AM or FM, is currently licensed to Marble Falls.* See Exhibit A, the Declaration of Stephan A. Kramer, P.E., Maxagrid's

consulting engineer. Three stations are licensed to communities in Burnet County, but none to Marble Falls. Moreover, KGI's claims to unique status as an emergency outlet are less than meets the eye. Participation in the Colorado River Radio Network, which disseminates emergency information for the Lower Colorado River Authority, is completely voluntary and confers no official status. There is, in fact, no one station designated as an "exclusive" or "primary" outlet for emergency information. See Exhibit B. KLHA's status as "official" station for the City of Marble Falls Emergency Management Administration is a relic of a bygone era when no other stations served the area. See Exhibit C.

8. In weighing Maxagrid's proposal, the staff must honor the mandate of Congress, set forth in § 307(b) of the Communications Act:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. § 307(b). In furtherance of that duty, the FCC, via Revision of FM Assignment Policies and Procedures, 90 F.C.C. 2d 88 (1982), set the following priorities:

- first aural service;
- second aural service;
- first local service; and
- other public-interest matters.

9. Without a doubt, Marble Falls deserves a local service. The community has its own elected government, with its own Mayor and City Council. Marble Falls provides its own Police and Fire protection. The community has a large number of businesses, places of worship, enjoys railroad service, and is experiencing -- and will continue to experience --

significant growth. These facts set Marble Falls distinctly apart from Llano, whose own demographic trends are unfavorable.

10. Any reception service that Marble Falls may enjoy from stations licensed elsewhere is truly irrelevant. Service from stations licensed to other communities is **no substitute** for **local** service. Conklin, New York, 5 FCC Rcd 1104 (1990); Tallahassee, Florida et al., 3 F.C.C. Rcd 5542 (1988); State College, Pennsylvania et al., 2 F.C.C. Rcd 3909 (1987); Greenwood, South Carolina et al., 63 Rad. Reg. (P & F) 2d 251, 257-258 (M.M. Bur. 1987).² Were it otherwise, there would be no point to licensing a station to any particular community. But the focus of localism, the cornerstone of the broadcast-licensing structure, is **transmission** service to worthy communities.³

11. In addition to the statutory imperative to provide transmission service to as many communities as possible, the Commission must also grant proposals which would result in greater spectral efficiency. As Maxagrid's Comments in this proceeding have shown, adoption of Maxagrid's proposal would result in a substantially more efficient use of the radio

² "While many parties contend that Biltmore Forest is already well served by the Asheville stations, the Commission has held on numerous occasions that service from stations located outside the community cannot be a substitute for local service. We also find the argument that the allotment would in reality be just another Asheville public service to be without merit. See Clinton, La., 45 [Rad. Reg. (P & F)] 2d 1587 (1979) and Westover and Grafton, W.V., 46 [Fed. Reg.] 10737, published February 4, 1981."

³ **Any** station may air public-affairs programs specially for **any** community in which it has listeners -- so long as the station does not shortchange its home community in the process. But **no station**, licensed elsewhere, even one addressing issues of a town lacking local service, can fill the special void in that community. Greenwood, supra. Any station's present protected reception service to Marble Falls is thus irrelevant.

spectrum. More than 110,000 people would receive a new primary service, and only 67 people would lose a third nighttime protected service. In such contexts, spectral-efficiency considerations are paramount, Endicott, New York, 51 F.C.C. 2d 50 (1981). The dramatic gain in primary service reinforces the merit of Maxagrid's proposal to provide a first local service to Marble Falls.

12. KGI's Comments seek to preserve the *status quo*, which serves KGI's private business interests. However, both are immaterial. The Commission cannot shape the result in this proceeding to serve one party's private goals at the expense of the public interest. Vero Beach, Florida, 4 F.C.C. Rcd 2184 (1989); West Palm Beach, Florida, 6 Rad. Reg. (P & F) 2d 1514, 1518 (1965). See also, Southeastern Bible College, Inc., 49 Rad. Reg. (P & F) 2d 243, 246 (Rev. Bd. 1981) ("In any event, we cannot permit the solution which we find will provide the most effective use of the channel to be vetoed by either of the parties.") And KGI's characterization of a first local service to Marble Falls as "unnecessary" is not merely false, but also both presumptuous in the extreme and directly at odds with long- and firmly established FCC precedent. See Conklin, New York, supra, and the cases cited therein.

III. Other Matters


We tender herewith, as Exhibit D. the executed original of the Declaration of Duane Fox, submitted in facsimile form with Maxagrid's Comments in this proceeding.

IV. Conclusion

Maxagrid has conclusively shown that the Commission should relicense station KBAE(FM), from Channel 284C3 at Llano, Texas, to Channel 285C3 at Marble Falls, while allotting Channel 242A to Llano to ensure continued transmission service to that community. This would result in the provision of a first local service to a deserving community and more efficient use of the station's current channel. This two-fold consequence would clearly serve the public interest.

Respectfully submitted,

MAXAGRID BROADCASTING CORPORATION

By 
J.J. McVeigh
Its Counsel

Multinational Legal Services, P.C.
11 Dupont Circle, Suite 700
Washington, D.C. 20036

Date: July 7, 1995

EXHIBIT A

STEPHAN M. KRAMER, P.E. AND ASSOCIATES

BROADCAST AND FAA CONSULTING ENGINEERS

10500 BIGHORN TRAIL, SUITE 100 • MCKINNEY, TX 75070 • (214) 529-5123

ENGINEERING STATEMENT

This Engineering Statement was prepared on behalf of Maxagrid Broadcasting Corporation, licensee of FM station KBAE, 104.7 MHz, Llano, Texas, in support of reply comments in Docket 95-49.

A review of Section 73.202, current as of this date, revealed there are no FM facilities allocated to the community of Marble Falls, Texas. Likewise, a review of the Commission AM data base revealed there are no AM broadcast facilities licensed to Marble Falls, Texas.

It was noted in Comments advanced by the Kirkman Group, Inc., that multiple stations were licensed to Marble Falls, Texas, however, that statement was in error. There are in fact two FM and one AM facility licensed within the County of Burnet, none of which are licensed to the community of Marble Falls.

STEPHAN M. KRAMER, P.E. AND ASSOCIATES

BROADCAST AND FAA CONSULTING ENGINEERS

10500 BIGHORN TRAIL, SUITE 100 • MCKINNEY, TX 75070 • (214) 529-5123

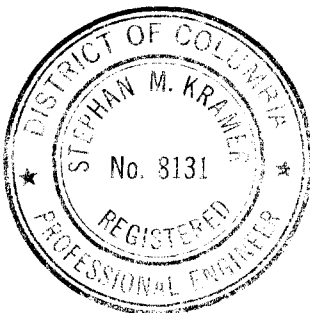
Engineering Affidavit

State of Texas)
) ss:
County of Collin)

Stephan M. Kramer, being duly sworn, deposes and states that he is a Registered Professional Engineer licensed in Texas and the District of Columbia, that he holds a B.S. Degree in Electrical Engineering from the University of Akron, and that he is a qualified and experienced Communications Consulting Engineer whose expert testimony and works are a matter of record with the Federal Communications Commission having received numerous application grants. He further states Maxagrid Broadcasting Corporation retained the firm of Stephan M. Kramer, P.E. and Associates to prepare the attached Engineering Statement.

The deponent further indicates the Statement was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

This declaration is made under penalty of perjury under the laws of the United States.



Stephan M. Kramer P.E. 7-05-95

Stephan M. Kramer, P.E.

Texas P.E. # 54370

District of Columbia P.E. # 8131

STEPHAN M. KRAMER, P.E. AND ASSOCIATES
BROADCAST AND FAA CONSULTING ENGINEERS
10500 BIGHORN TRAIL, SUITE 100 • MCKINNEY, TX 75070 • (214) 529-5123

Engineering Affidavit

State of Texas)
) ss:
County of Collin)

Gerald A. Yacuzzi, being duly sworn, deposes and states that he is an experienced broadcast engineer with an FCC General Class Radiotelephone license, and that he has prepared numerous applications granted by the Commission under the direction of an experienced Registered Professional Engineer. He further states Maxagrid Broadcasting Corporation retained the firm of Stephan M. Kramer, P.E, and Associates to prepare the attached Engineering Statement.

The deponent further indicates the Statement was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

This declaration is made under penalty of perjury under the laws of the United States.

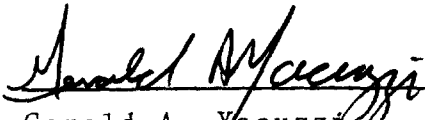
 7-5-95
Gerald A. Yacuzzi
FCC License # PG-18-8569

EXHIBIT B



June 28, 1995

Duane Fox, Owner
KBAY Radio
Hwy. 2147, Suite #112
P.O. Box 8715
Horseshoe Bay, Texas 78657

Dear Duane:

Thank you for your participation in the Colorado River Radio Network, which is designed to provide river-basin residents with information on river conditions, both on a regular and emergency basis.

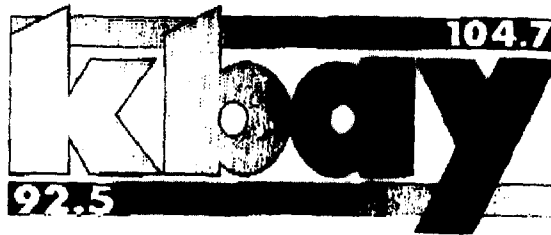
As we discussed, participation in the Network is completely voluntary for each station. Also, the LCRA has determined it best not to designate only one station as our exclusive or primary affiliate in the dissemination of emergency information for a particular region. This is based on the LCRA's status as a public agency, as well as a public-safety consideration to use any and all appropriate channels to convey emergency information quickly and effectively.

We value our relationship with you and look forward to a continued cordial relationship. Thanks again for your participation in the Colorado River Radio Network.

Sincerely,

John Williams
Station Manager, KWTR Radio
and Colorado River Radio Network

EXHIBIT C



M E M O

TO: DUANE FOX
FROM: DOUG SMITH, INFORMATION DIRECTOR
DATE: JUNE 27, 1995
RE: EMERGENCY MANAGEMENT ADMINISTRATION
FOR THE CITY OF MARBLE FALLS

AS PER OUR CONVERSATION ABOUT KHLB BEING THE OFFICIAL RADIO STATION FOR THE CITY OF MARBLE FALLS EMERGENCY MANAGEMENT ADMINISTRATION. I TALKED WITH MARBLE FALLS CITY MANAGER, MICHAEL STOLDT AND HE INFORMED ME THAT, "KHLB WAS GIVEN THAT TITLE YEARS AGO WHEN THEY WERE THE ONLY RADIO STATION IN THE AREA." MR. STOLDT ALSO INFORMED ME THAT HE WILL "LOOK INTO HAVING US AS PART OF THE CITIES EMERGENCY MANAGEMENT ADMINISTRATION AS SOON AS TIME ALLOWS HIM TO.

AS INFORMATION DIRECTOR FOR KBAY 104.7, I CAN SAY THAT IF AN EMERGENCY WITHIN THE CITY OF MARBLE FALLS WARRANTED IMMEDIATE ATTENTION TO BE BROUGHT TO THE PUBLIC, THAT I WOULD HAVE THE RESOURCES TO BE ABLE TO DO SO.

DS/ja

EXHIBIT D

DECLARATION OF DUANE FOX

I, Duane Fox, offer the following Declaration of facts, gathered for filing with the Federal Communications Commission as part of the Comments of Maxagrid Broadcasting Corporation in MM Docket No. 95-49.

1. Local Chamber of Commerce data peg Llano's population at 3,000. Those data also show that Kingsland and Horseshoe Bay, both of which are also in Llano County, are larger than Llano (4,200 and 3,576, respectively). Local Chamber data peg the estimated 1999 population of Llano at 3,500, and the median age of Llano's resident at 55.5. Based on my investigation, Llano does not enjoy railroad service and has little if any prospects for geographic expansion. See Attachment 1. Llano has nine places of worship, and the town government employs 37 people.

2. Local Chamber of Commerce data peg Marble Falls' population at 4,500, larger than that of Burnet (4,100), the County Seat. The next-largest community is Spicewood, population 1,500. The local Chamber estimates the 1999 population of Marble Falls at 9,500 -- almost triple the estimate for Llano. The Chamber reports that the median age of Marble Falls' residents is 33.9. Marble Falls has 16 places of worship, and the town government employs 77 people.

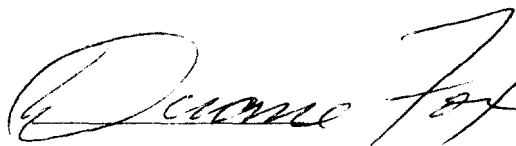
3. Based on my investigation, in 1994, retail purchases in Llano generated \$156,376 in tax revenue, while retail activity in Marble Falls generated \$2,135,432 in sales taxes. For the current year to date, commercial activity in Marble Falls has generated \$1,320,641 in sales tax. Commercial activity in Llano has generated \$63,422 in sales tax. Also based on my investigation, in 1994, Llano issued only six new building permits. For Marble Falls and for the same period, the total was 374. For the current year to date, no building permits have issued for Llano, while Marble Falls has issued 110. Based on commercial-account data from the utilities which serve Marble Falls and Llano, respectively, there are 589 active commercial (that is, business as opposed

to residential) accounts in Marble Falls, but only 237 in Llano.

4. To accommodate the growth that Marble Falls has been experiencing, the community has embarked on significant upgrade of its water-supply and sewer systems. The town has its own Mayor and City Council, administrative staff, professional Police and Fire protection, Municipal Court, Parks and Recreation Department, and airport. The Marble Falls Police Department has 22 employees (12 of whom are officers) and seven vehicles. The Llano police force has only six employees and six cars. The Marble Falls Fire Department has 21 employees and seven vehicles. Llano, by contrast, has volunteer fire fighters. As of May 26, 1994, the Marble Falls Independent School District, which serves Marble Falls and surrounding areas, had a total enrollment (Pre-Kindergarten through Grade 12) of 2716. As of May 25, 1995, the Marble Falls Independent School District had a total enrollment of 2920, an increase of 204 students. By contrast, the current total enrollment in the Llano Independent School District, which serves Llano and surrounding areas, is only 1,384, less than 50% of the Marble Falls District's student roster.

The foregoing is true and correct to the best of my personal knowledge, information, and belief, under penalty of perjury.

DUANE FOX

A handwritten signature in cursive script that reads "Duane Fox". The signature is written in dark ink and is positioned below the printed name.

Date: June 21, 1995

CERTIFICATE OF SERVICE

I, Kelley Marie Curtis, a secretary to the law firm of Multinational Legal Services, P.C., hereby certify that I have this Seventh day of July, 1995, sent copies of the foregoing "Reply Comments" by first-class United States mail, postage prepaid, to:

*John Karousos, Esq.
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
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Washington, D.C. 20554

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Counsel to Roy E. Henderson



Kelley Marie Curtis